

VIA FACSIMILE TO (202) 501-1836, (202) 501-1450 AND CERTIFIED MAIL

July 21, 2003

Karen Higginbotham, Director
EPA Office of Civil Rights
Ariel Rios Building
Mail Code 1201A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Mary Ann Horinko, Acting Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: *Don't Waste Arizona, Inc. v Arizona Department of Environmental Quality, 2003*

Dear Director Higginbotham and Mary Ann Horinko, Acting EPA Administrator:

The Arizona Department of Environmental Quality (ADEQ) has again, *intentionally*, violated Title VI of the Civil Rights Act of 1964 and the Environmental Protection Agency's ("EPA") implementing regulation, 40 C.F.R. § 7.35, by discriminating on the basis of race in failing to provide a method for low-income and Latino citizens in Hayden and Winkelman, Arizona, to complain about severe air pollution noncompliance issues associated with the ASARCO copper smelter in Hayden, Arizona. The ADEQ is the agency that issues air pollution permits for facilities in Hayden and Winkelman, and has indeed issued a Title V permit for this facility.

The towns of Hayden and Winkelman are over 90% Latino, and overwhelmingly low-income. Don't Waste Arizona, Inc. (DWA) is an environmental justice organization with members in the affected area. Some of these DWA members do not have a home telephone number or access to a phone to call ADEQ other than the ADEQ toll-free number. Even when these DWA members do have access to a telephone, they are unable

to file complaints on weekends, evenings, holidays, and even during “normal business hours.”

With a change in administration at the ADEQ due to the 2002 elections, DWA thought negotiating to resolve this first outstanding civil rights complaint would be worth attempting, and approached Jay Spector of the ADEQ Director’s Office earlier this year in an effort to resolve this continuing civil rights violation. The previous civil rights complaint was provided to Spector, and an offer to meet and negotiate was tendered, with a suggestion that changing the ADEQ answering system to allow callers to leave messages would be a good start towards solving the problem. But even though there have been some changes made to the telephone system at the ADEQ since the arrival and installation of the new administration, there is still no method for callers in the evenings, weekends, or holidays to leave a message about non-compliance at the ASARCO smelter. And even when citizen complaint calls are made during “normal business hours,” there is no one at the ADEQ Air Quality Division to take the complaint, or citizens find that their complaints are not taken, and the polluter is defended.

With Spector aware of the allegations of on-going civil rights violations, and with his not taking any action and perpetuating the problem, even when the phone system at ADEQ was altered without attempting to resolve the lack of access to the agency by environmental justice communities, particularly the environmental justice communities of Hayden and Winkelman, it would appear the civil rights violations alleged in this complaint are *intentional*, knowing violations.

ADEQ's discriminatory acts (for the purposes of this complaint) occurred specifically on July 8, 2003, and July 17, 2003. The specific discriminatory act was the failure of ADEQ to provide a means, such as a toll-free number and complaint system that actually allows complaints to be lodged, either during normal business hours or not, for low-income and minority people in Hayden, Arizona, to report noncompliance with Title V air permit conditions and the disproportionately high and adverse human health or environmental effects of illegal emissions from the ASARCO-Hayden smelter, which are an indication of ADEQ's failure to properly permit and oversee the Title V permit conditions of the ASARCO-Hayden smelter. **The discriminatory acts by ADEQ continue even today** because the agency has not rectified the problem despite being aware of the problems with the toll-free number.

On July 8, 2003, a DWA member tried repeatedly to complain to ADEQ about air pollution caused by the operations of the ASARCO smelter operation, as well as blowing dust from the tailings piles surrounding the towns. This dust is high in arsenic, lead, and other heavy metals, as well as being very fine particulate matter. Instead of taking her complaint and investigating, the ADEQ representative instead made excuses and defended the industry’s economic contribution to the towns as it is the major employer.

On July 17, 2003, a DWA member tried to contact ADEQ to file a complaint about suspected Carbon Monoxide NAAQG exceedances. The carbon monoxide monitors inside a residence adjacent to the smelter had signaled exceedances and danger, and the

responding fire departments ascertained that the only possible source was the outside ambient air that was being blown into the residence through the ventilation system. The DWA member was unable to reach anyone at ADEQ during normal business hours to file a complaint about this. Then the DWA member notified DWA staff about the problem. DWA staff then also tried, unsuccessfully, during normal business hours on Thursday, July 17, 2003, to reach someone at the ADEQ Air Quality Division to file a complaint. DWA staff even contacted the ADEQ Director's Office, and the assistant there, a woman only identified as Karen, was also unable to reach anyone at the ADEQ Air Quality Division to file a complaint.

The ADEQ's complaint process is discriminatory even though it is the same for all residents statewide because there is an extremely disproportionate amount of these enormous sources (major source is inadequate to express the scale of air pollution actually emitted) of air pollution permitted by ADEQ in low-income, ethnic minority communities in Arizona, particularly the smelter towns (Globe-Miami, San Manuel, Hayden) in Arizona. The ADEQ has not issued Title V, major source air pollution permits to smelters or other Title V sources in middle and upper-income white communities in Arizona. So since there are no huge air pollution sources in these communities, the middle and upper-income white communities would not need to utilize the toll-free number or have occasion to contact ADEQ regarding an environmental problem associated with a Title V permit at a nearby facility.

DWA incorporates by reference the materials that are posted to the EPA's own website regarding civil rights violations, (Emphasis added.)"

EPA's Program to Implement Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 is a federal law that prohibits discrimination on the basis of race, color, or national origin in all programs or activities receiving federal financial assistance. Title VI itself prohibits intentional discrimination.

The Supreme Court has ruled, however, that Title VI authorizes federal agencies, including EPA, to adopt implementing regulations that prohibit **discriminatory effects** as well as intentional discrimination. Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating. Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative."

DWA also notes that for another method of making citizen complaints could or should be provided 24 hours per day, seven days per week for citizens who do not have phone:

ADEQ should provide an option on the toll-free number that pages a responsible duty officer at ADEQ if the call is made after normal business hours and there is reason to be concerned about an imminent and substantial endangerment to the environment or public health and safety. Please note that regarding two of the calls in the instant case were made during normal business hours, and no one was on duty and available to handle the

call, so the receptionist must also be trained to page that responsible duty officer at ADEQ (Air Quality Division or other department) if the call comes in during business hours and there is reason to be concerned about an imminent and substantial endangerment to the environment or public health and safety. For complaints that are not such immediate emergencies, there must be a method to leave a message about the complaint, as even that is missing from this current ADEQ toll-free number and system.

A simple review of ADEQ's Title V permits that have been issued, as well as all major source permits that have been issued by the ADEQ and not yet converted into Title V permits, will show that these permitted facilities are all in or adjacent to low-income, ethnic minority communities. No one has attempted to site facilities that would be permitted by ADEQ that emit disproportionate, dangerous amounts and types of air pollution in upper and middle income white communities in this state. The types of facilities getting these major source/Title V air pollution permits from ADEQ are smelters, refineries, coal-fired and natural gas-fired power plants, and others.

The ASARCO copper smelter in Hayden, Arizona, is already an enormous source of air pollution and releases reported under the Toxics Release Inventory (TRI). Indeed, this facility is and has been one of the top releasers in the nation reporting to the TRI. There are serious problems and adverse health consequences in the towns of Hayden and Winkelman associated with smoke and particulate matter emitted from this ASARCO facility, particularly at night, but also even during the day. The standard for acceptable levels of arsenic in the ambient air in Hayden and Winkelman have always been exceeded, and local residents have long complained of adverse health effects that would be associated with such exposures.

The ASARCO air emissions are contaminated with lead, arsenic, and other heavy metals, as well as sulfur dioxide and sulfuric acid mist. The ATSDR issued a report in 1997 fingering Hayden as one of the most impacted by sulfur dioxide emissions. So Hayden and Winkelman residents who are Don't Waste Arizona, Inc. members are already at a disproportionate, adverse risk from toxic emissions from this facility, and from the chemicals used and stored there. When there are additional noncompliance and excess emissions issues associated with this facility, it only exacerbates the disproportionate, adverse conditions of risk and impact upon the local low-income and ethnic minority residents.

The ADEQ, unlike most agencies that issue air permits under EPA delegation, issues air pollution permits mostly for facilities that are not proximate to its headquarters in Phoenix. The ADEQ has no real way of knowing if most of the facilities it has permitted are actually complying with or violating the terms of air pollution permits without ADEQ staff visually observing air pollution violations. Few air pollution permits issued by the ADEQ require Continuous Emissions Monitoring.

And the ADEQ has a dismal record of inspecting the facilities it has permitted, and "annual" inspections are very rare. Some facilities ADEQ permits are never inspected at all, or not while process equipment is actually operating. Many inspections occur only

after the ADEQ receives a citizen complaint. The timeliness of agency notification of an air pollution problem at a facility is especially important and relevant to the effectiveness of citizens' air pollution complaints. So to legitimize its administration of the air pollution program, ADEQ must rely on citizens calling to query and/or complain, as the agency conducts no other real oversight. Thus to have a credible enforcement program as a duty of its Clean Air Act Title V delegation authority, the ADEQ must have a telephone system that can take complaints at any time of the hours of operations that it has provided any facility it has permitted. The ASARCO-Hayden smelter operates 24 hours/day, seven days a week, as do many of the other facilities permitted by the ADEQ.

The ADEQ does have a "hotline," 1-800-234-5677, allegedly for people outside the Phoenix metro area to use to call the agency and file citizens complaints regarding the facilities permitted by the agency. However, when Hayden and Winkelman residents have tried to utilize this, they have had consistent problems. If Hayden and Winkelman residents attempt to use this hotline during evening, nighttime, or weekend, hours, the hotline provides no way to leave a message or a complaint. Yet the ADEQ was notified years ago via a Clean Air Act citizen suit notice letter that there were significant excess emissions at night in Hayden that appeared to violate the Clean Air Act. With this knowledge, the ADEQ still took no action to provide a method for citizens to complain about excess emissions from the ASARCO-Hayden smelter at nighttime in Hayden and Winkelman.

Clearly the ADEQ has failed to provide a reliable mechanism for low-income and ethnic minority people living in rural and out state areas, where almost all of the ADEQ-permitted facilities are located, to report environmental concerns and noncompliance regarding these facilities. And yet the director of the Air Quality Division, Nancy Wrona, was specifically contacted regarding the problems with the hotline on August 1, 2000. The ADEQ also was notified by the first civil rights complaint filed against the agency regarding this same issue. The ADEQ has certainly been adequately notified of this problem. The failure to rectify this problem with the hotline at this point must be assumed to be *deliberate and intentional*, and not an aberration.

Repeatedly, poorer communities of color, like this Latino community, have been the designated recipients of disproportionate, dangerous amounts and types of air pollution from facilities permitted by ADEQ, bearing a disproportionate share of the state's environmental dangers, with no mechanism provided by ADEQ to mitigate the disproportionate, dangerously large amounts and types of air pollution by providing a method for the public to effectively complain about incidents involving noncompliance.

And a review of the ADEQ's budget submittals indicates that over half of citizens' complaints regarding air pollution from ADEQ-regulated facilities are not even responded to at all. This clear pattern of discriminatory impact cannot be ignored any longer by ADEQ or USEPA.

I. PARTIES

A. Complainants

Don't Waste Arizona, Inc., an environmental justice organization with affected members residing in Hayden and Winkelman, is filing this complaint against ADEQ. Some of these Don't Waste Arizona, Inc. members do not have a home telephone number or access to a phone to call ADEQ other than the ADEQ toll-free number. Other DWA members who do have access are still unable to file complaints with the ADEQ because there is no one even during normal business hours to take the air quality complaints.

B. Respondent Arizona Department of Environmental Quality (ADEQ)

ADEQ is the state agency that is responsible for implementing, administering, and enforcing the Arizona SIP, which includes both Class II permits (non-Title V) as well as federal Title V air pollution permits, and Title VI of the Civil Rights Act of 1964. ADEQ, as a recipient of federal funds from EPA, is subject to the requirements of Title VI of the Civil Rights Act.

II. RIPENESS

This complaint comes as a result of recent incidents, after a history of incidents, some the subject of an earlier civil rights complaint, where serious air pollution problems and probable noncompliance with a facility's Title V permit requirements, especially at night, were impossible to provide to the ADEQ because the agency steadfastly refuses to provide a reliable method to do so. There is a need for a 24-hour, manned, toll-free number or other method of contacting the agency regarding serious environmental problems that must be available to those without home telephones. The low-income, ethnic minority people of Hayden and Winkelman who are impacted by the noncompliance are unable to contact the agency without a viable telephone number and administrative processes inside the agency to actually handle these citizens' complaints. The ADEQ has been provided specific notice of the problem and deficiency, yet has not remedied the problem.

III. CONTEXT

Don't Waste Arizona, Inc. had notified the ADEQ of problems with the "hotline" via written and oral communications, as well as the particular problems in Hayden with air pollution, especially at night, via a copy of a Clean Air Act citizen suit notice letter. DWA also approached the ADEQ Director's Office through an assistant, Jay Spector, with the past civil rights complaint and suggestions about how to mitigate this problem, to no avail.

The community (affected area) of Hayden and Winkelman was identified years ago as having high incidences of lung cancer and lead found in children. This data was found in the ADEQ Air Quality Division's files.

The affected area is currently comprised of mostly (>90%) Latino, while the Latino population is now only 25.3 percent of the state's 5,130,632 residents

Claims

A. Title VI

Title VI of the Civil Rights Act of 1964 provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d.

ADEQ, a recipient of federal financial assistance from EPA, has violated Title VI as implemented through EPA's regulations by repeatedly failing, after repeated notice, to provide an effective mechanism for low-income and Latino people living in Hayden and Winkelman, Arizona, to report severe noncompliance with Title V permit conditions at the ASARCO-Hayden smelter, and severe environmental and public health consequences.

EPA must ensure that recipients of EPA financial assistance are not subjecting people to discrimination. In particular, EPA's Title VI regulations provide that an EPA aid recipient "shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex." 40 C.F.R. § 7.35(b).

The failure of ADEQ to provide an effective mechanism for low-income and Latino people living in Hayden and Winkelman, Arizona, to report severe noncompliance with Title V permit conditions at the ASARCO-Hayden smelter, and severe environmental and public health consequences is ADEQ's method of discrimination, and is an extremely egregious example of its intentional discriminatory practices. It is impossible for the ADEQ to claim that it provides proper administrative oversight of its permitted facilities without providing a mechanism for citizens' complaints.

All complainants must show is that when applied in a particular manner, ADEQ's "method of administering its program" yields a discriminatory outcome. As the following sections demonstrate, ADEQ's method of administering its air pollution program has resulted in discriminatory impacts throughout this low-income, Latino community.

By issuing the ASARCO-Hayden copper smelter a Title V (major source) air pollution permit, and then failing to provide a method for the low-income and ethnic minority people living in the vicinity of the facility to complain about egregious air pollution violations caused by the facility, particularly those that reoccur at night and weekends,

the ADEQ has failed to meet its statutory duties under Title VI. ADEQ permitted a facility in this low-income, ethnic-minority town, and yet does not provide sufficient means in the administration of the air permitting program to monitor compliance.

The effect of ADEQ's Title V air pollution permitting process is clear: Latinos and other people of color will bear disproportionate impacts from air pollution; the agency will not properly administer its air pollution program; and the ADEQ will not provide a means to facilitate citizen complaints about noncompliance with Title V requirements, even when notified of problems with the complaint system.

By failing to provide a means for citizens to complain about noncompliance with Title V requirements, ADEQ has administered its program in such a way as to discriminate against people based on race, color, and national origin, in violation of Title VI.

Remedies

In order to provide effective remedies for the patterns of discrimination described in this complaint, the complainants request that EPA:

- Require that, as a condition of continuing to provide federal financial assistance, ADEQ immediately develop a method for citizens in the low-income and/or minority communities where ADEQ has issued Title V air pollution permits to make telephonic complaints about facility noncompliance with Title V permit conditions so these citizens may effectively register their complaints, 24 hours per day, seven days per week, or else limit Title V air pollution permits issued by ADEQ to hours that ADEQ agency staff are actually available to take citizens' complaints from members of low-income and/or ethnic minority communities where ADEQ has issued Title V air pollution permits;
- Require that, as a condition of continuing to provide federal financial assistance, ADEQ immediately develop a method to respond adequately and promptly to citizen complaints about facility noncompliance with Title V permit conditions from low-income and/or ethnic minority communities where ADEQ has issued these Title V permits *and* conduct an outreach to the low-income and/or ethnic minority communities where ADEQ has issued these Title V permits to inform these communities of the availability of the citizens' 24 hours per day, seven days per week, complaint line and complaint process;
- Impose an immediate moratorium on ADEQ's permitting of any other industrial facilities requiring Title V permits in low-income and/or communities of color;
- Withdraw ADEQ's authorization to administer the Clean Air Act Title V program for regulation of major sources of air pollution in low-income communities of color until such a moratorium is in place;

- Require, as a condition of continuing to provide federal financial assistance, that ADEQ withdraw any existing Title V air pollution permits, and cease issuing any new Title V air pollution permits, for new or expanded facilities in low-income and/or communities of color in Arizona until it has a competent, credible, scientific method of determining it is not violating the civil rights of communities of color and/or low-income communities;
- Permit complainants to initiate and engage in active, collaborative investigation of the foregoing allegations, including the submission of written interrogatories to ADEQ;
- Provide complainants with copies of all correspondence to or from the respondent throughout the course of the EPA's investigation, deliberation and disposition of this complaint;
- Request ADEQ to end its discriminatory statewide pattern of issuing Title V air pollution permits to industrial facilities in low-income and/or communities of color, and that, to this end, request that ADEQ use demographic data in considering permit applications;
- Sue to compel compliance with the law, to the extent that imposition of the foregoing remedies proves in any way to be ineffectual;
- Terminate its assistance to ADEQ, pursuant to 40 C.F.R. §7.25, if ADEQ fails to implement the above requested changes.

Conclusion

As this complaint makes clear, the low-income, Latino community adjacent to the ASARCO copper smelter in Hayden and Winkelman, Arizona typifies the low-income and/or communities of color burdened in Arizona by disproportionate adverse environmental impacts because of ADEQ's permitting process and subsequent failure to administrate these air pollution permits and provide a credible, available, mechanism for citizen complaints about facility noncompliance. The discriminatory impact created and sanctioned by ADEQ's actions is a clear violation of Title VI as implemented by EPA regulations. Because ADEQ receives federal funding from EPA, it is subject to Title VI as implemented by EPA regulations. This complaint is timely filed since ADEQ has still not provided a method for citizens in low-income and/or minority communities where ADEQ has issued Title V air pollution permits to facilities to file complaints about Title V permit violations in July 2003, which was less than 180 days ago, and there has been no final agency action on this issue.

Don't Waste Arizona, Inc. and its affected members look forward to an active investigation by EPA.

The complainants will be pleased to file further documentation of these claims as needed within the next few weeks, once EPA has specified to whom the documentation should be sent, and what further documentation is needed.

Sincerely,

Stephen M. Brittle
President,
Don't Waste Arizona, Inc.
For the Complainants